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SENATE BILL 446

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

INTRODUCED BY

MANNY M ARAGON

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR VOLUNTARY REMEDIATION OF CONTAMINATED REAL PROPERTY AND VOLUNTARY AGREEMENTS; AUTHORIZING COVENANTS NOT TO SUE; PROVIDING AUTHORIZATION FOR A FEE FOR ADMINISTRATION OF AGREEMENTS; APPROPRIATING FEES FOR OPERATION OF A VOLUNTARY REMEDIATION PROGRAM; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the "Voluntary Remediation Act".

Section 2. PURPOSE. -- The purpose of the Voluntary Remediation Act is to provide incentives for the voluntary assessment and remediation of contaminated property, with state oversight, and to remove future liability of lenders and landowners.

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Section 3. DEFINITIONS. --As used in the Voluntary  
Remediation Act:

A. "applicable standards" means federal or state  
standards, requirements, criteria or limitations that are  
legally applicable to the facility;

B. "applicant" means a person that elects to submit  
an application to participate and enter into an agreement under  
the Voluntary Remediation Act;

C. "contaminant" means:

- (1) solid waste;
- (2) hazardous waste as defined by Section 1004  
(5) of the federal Solid Waste Disposal Act and 40 C.F.R. Part  
261.3;
- (3) an RCRA hazardous waste constituent listed  
in 40 C.F.R. Part 261, Appendix VIII;
- (4) any substance that could alter, if  
discharged or spilled, the physical, chemical, biological or  
radiological qualities of water;
- (5) a hazardous substance, as defined by  
Section 101(14) of the federal Comprehensive Environmental  
Response, Compensation and Liability Act and 40 C.F.R. Part 302,  
Table 302.4; or
- (6) petroleum substances within the  
jurisdiction of the department;

D. "department" means the department of environment;

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E. "enforcement action" means:

(1) a written notice from the department or other state agency which requires abatement of contamination under 20 NMAC 6.2;

(2) a written order from the department or other state agency that requires or involves the removal or remediation of contaminants; or

(3) a judicial action by the department or other state agency seeking the abatement of contamination or the remediation of contaminants; or

(4) a notice, order or judicial action similar to those enumerated in Paragraphs (1) through (3) of this subsection, but initiated by the federal government;

F. "fraud" means the knowingly false representation, whether by words or conduct, and whether by inaccurate or misleading allegations, or by concealment of that which should have been disclosed, that is intended to deceive or circumvent the intent of this statute;

G. "participant" means an applicant that has been approved by the department as eligible for and who signs and performs an agreement pursuant to the provisions of the Voluntary Remediation Act;

H. "person" means a legal entity;

I. "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,

1 leaching, dumping or disposing into the environment, including  
2 abandonment or discarding, of any contaminant;

3 J. "remediation" means:

4 (1) actions necessary to investigate, prevent,  
5 minimize or mitigate damages to the public health or to the  
6 environment, which may otherwise result from a release or threat  
7 of release; and

8 (2) the cleanup or removal of released  
9 contaminants to applicable standards;

10 K. "site" means a parcel of real property for which  
11 an application has been submitted under Section 5 of the  
12 Voluntary Remediation Act; and

13 L. "voluntary remediation" means a response action  
14 taken under and in compliance with the Voluntary Remediation  
15 Act.

16 Section 4. REGULATIONS. --The department shall adopt and  
17 promulgate rules and regulations necessary to implement the  
18 provisions of the Voluntary Remediation Act. The rules and  
19 regulations shall provide for, among other things, the amount of  
20 the nonrefundable application fee and a schedule for the cost of  
21 the department's oversight of the voluntary remediation.

22 Section 5. APPLICATION AND FEE. --

23 A. To be eligible for a voluntary remediation  
24 agreement an applicant must:

25 (1) own the site;

- 1 (2) operate a facility located on the site;  
2 (3) be a prospective owner of the site; or  
3 (4) be a prospective operator of a facility at  
4 the site.

5 B. An applicant shall pay at the time of submitting  
6 the application a reasonable, nonrefundable application fee  
7 determined by the department in advance, which will pay for the  
8 costs to the department of processing the application.

9 C. The participant shall pay all costs of the  
10 department's oversight of the voluntary remediation.

11 D. The department shall reject an application for a  
12 voluntary remediation agreement if the department determines:

13 (1) the contaminants at the site constitute an  
14 unreasonable threat to human health or the environment;

15 (2) an administrative or judicial state or  
16 federal enforcement action is pending that concerns the  
17 remediation of a contaminant described in the application;

18 (3) a federal grant requires an enforcement  
19 action at the site;

20 (4) the application is incomplete or  
21 inaccurate; or

22 (5) the facility is operating under a state or  
23 federal permit which addresses a contaminant described in the  
24 application, or a permit is pending; or

25 (6) the applicant has, within ten years

1 immediately preceding the date of submission of the permit  
2 application:

3 (a) knowingly misrepresented a material  
4 fact in an application for a permit;

5 (b) refused or failed to disclose any  
6 information required under this act;

7 (c) been convicted of a felony or crime  
8 involving moral turpitude;

9 (d) been convicted of a felony in any  
10 court for any crime defined by state or federal law as being a  
11 restraint of trade, price-fixing, bribery or fraud;

12 (e) exhibited a history of willful  
13 disregard for environmental laws of any state of the United  
14 States; or

15 (f) had an environmental permit revoked  
16 or permanently suspended for cause under any environmental laws  
17 of any state of the United States.

18 E. The department shall determine, on a first come  
19 first served basis and within a reasonable period defined by  
20 regulation, if the applicant is eligible to participate in a  
21 voluntary remediation agreement under the Voluntary Remediation  
22 Act.

23 F. If an agreement is not reached between an  
24 applicant and the department on or before the thirtieth day  
25 after the department determines an applicant to be eligible

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1 pursuant to Section 5 of the Voluntary Remediation Act, the  
2 applicant or the department may withdraw from the negotiations.

3 Section 6. AGREEMENT. --

4 A. After the department determines that an applicant  
5 is eligible, the secretary of environment may enter into a  
6 voluntary remediation agreement that sets forth the terms and  
7 conditions of the department's evaluation and implementation of  
8 the oversight to be performed.

9 B. The department shall not initiate an enforcement  
10 action, including an administrative or judicial action, against  
11 a participant for the contamination or release thereof, or for  
12 the activity that resulted in the contamination or release  
13 thereof, if the contamination is the subject of an agreement  
14 pursuant to the provisions of the Voluntary Remediation Act, but  
15 this section shall not be a bar to enforcement if the  
16 participant does not successfully implement this agreement.

17 C. The department or the participant, in the sole  
18 discretion of either, may terminate a voluntary remediation  
19 agreement on sixty days' written notice. The department's costs  
20 incurred or obligated before the date the notice of termination  
21 is received are recoverable under the agreement if the agreement  
22 is terminated.

23 D. In the event that the participant is unable to  
24 resolve a dispute concerning the actions required under a  
25 voluntary remediation agreement, the participant may submit a

1 written request for a final decision to the secretary of  
2 environment. The secretary shall issue a binding final  
3 decision, including a written statement of the reason for the  
4 decision.

5 E. After a voluntary remediation agreement becomes  
6 effective, the participant may submit a proposed voluntary  
7 remediation work plan for the required cleanup or that  
8 demonstrates that a cleanup is not required in order to comply  
9 with applicable standards.

10 Section 7. CERTIFICATE OF COMPLETION. --If the department  
11 determines that a participant has successfully complied with the  
12 voluntary remediation agreement and the site conditions meet  
13 applicable standards, the department shall issue the participant  
14 a certificate of completion.

15 Section 8. COVENANT NOT TO SUE. --

16 A. After the department issues a certificate of  
17 completion for a site, the secretary of environment shall  
18 provide a covenant not to sue to a purchaser of the site that  
19 did not contribute to the site contamination for any direct  
20 liability, including future liability for claims based upon the  
21 contamination covered by the agreement and over which the  
22 department has authority. No person provided a covenant not to  
23 sue pursuant to this section shall be liable for claims for  
24 contribution for cleanup of a contaminant that is the subject of  
25 the voluntary remediation agreement. Except as may be provided

1 under federal law or as may be agreed to by a federal government  
2 entity, the covenant not to sue shall not release a participant  
3 from liability to the federal government for claims based on  
4 federal law. Except as may be agreed to by third parties, the  
5 covenant not to sue shall not release a person from liability to  
6 third parties.

7 B. The secretary of environment's covenant not to  
8 sue under this section shall be transferable with title to the  
9 site.

10 Section 9. RECISION. -- Nothing in the Voluntary Remediation  
11 Act shall prohibit the secretary of environment from rescinding  
12 a certificate of completion or a covenant not to sue if the  
13 department determines that:

14 A. a contaminant addressed in the agreement is an  
15 unreasonable threat to human health or the environment;

16 B. the agreement was performed in a manner which  
17 fails to comply substantially with the terms and conditions of  
18 the agreement or voluntary remediation work plan;

19 C. the voluntary remediation agreement is a result  
20 of fraud; or

21 D. contamination was present at the site at the time  
22 the voluntary remediation agreement was signed but the  
23 department did not know of the type, extent or magnitude of the  
24 contaminants.

25 Section 10. LENDER LIABILITY. -- An applicant who maintains

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1   indicia of ownership primarily to protect a security interest in  
2   a site that is the subject of a voluntary remediation agreement  
3   and that does not participate in the management of the site, and  
4   is not in control of or does not have responsibility for daily  
5   operation of the site shall not be considered an owner or  
6   operator of that site and shall not be liable under any  
7   contaminant control or other environmental protection law or  
8   regulation administered by the department or otherwise  
9   responsible to the department for any environmental  
10  contamination or response action costs associated with the site.  
11  This section shall apply to all indicia of ownership existing on  
12  and after the effective date of the Voluntary Remediation Act.

13       Section 11. VOLUNTARY REMEDIATION FUND. --The "voluntary  
14  remediation fund" is created in the state treasury. The fund  
15  shall be administered by the department. All fees and cost  
16  reimbursements collected pursuant to the regulations adopted by  
17  the secretary of environment pursuant to the provisions of the  
18  Voluntary Remediation Act shall be deposited in the fund. Money  
19  in the fund is appropriated to the department for the purpose of  
20  administering the Voluntary Remediation Act. Disbursements from  
21  the fund shall be made upon warrants drawn by the secretary of  
22  finance and administration pursuant to vouchers signed by the  
23  secretary of environment.

24       Section 12. SEVERABILITY. --If any part or application of  
25  the Voluntary Remediation Act is held invalid, the remainder or

1 its application to other situations or applicants shall not be  
2 affected.

3 Section 13. EMERGENCY.--It is necessary for the public  
4 peace, health and safety that this act take effect immediately.

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SENATE CONSERVATION COMMITTEE SUBSTITUTE FOR  
SENATE BILLS 446 & 362

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR VOLUNTARY REMEDIATION  
OF CONTAMINATED REAL PROPERTY AND VOLUNTARY AGREEMENTS;  
AUTHORIZING COVENANTS NOT TO SUE; PROVIDING AUTHORIZATION FOR A  
FEE FOR ADMINISTRATION OF AGREEMENTS; APPROPRIATING FEES FOR  
OPERATION OF A VOLUNTARY REMEDIATION FUND; DECLARING AN  
EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the  
"Voluntary Remediation Act".

Section 2. PURPOSE. -- The purpose of the Voluntary  
Remediation Act is to provide incentives for the voluntary  
assessment and remediation of contaminated property, with state  
oversight, and to remove future liability of lenders and  
landowners.

1           Section 3.   DEFINITIONS. --As used in the Voluntary  
2 Remediation Act:

3           A.   "applicable standards" means federal, state or  
4 local standards, requirements, criteria or limitations that are  
5 legally applicable to the facility;

6           B.   "applicant" means a person that elects to submit  
7 an application to participate and enter into an agreement under  
8 the Voluntary Remediation Act;

9           C.   "contaminant" means the following substances  
10 within the jurisdiction of the department:

11                   (1)   solid waste;

12                   (2)   hazardous waste as defined in 20 NMAC

13                   4. 1. 200;

14                   (3)   an RCRA hazardous waste constituent listed  
15 in Appendices VIII and IX in 20 NMAC 4. 1. 200;

16                   (4)   any substance that could alter, if  
17 discharged or spilled, the physical, chemical, biological or  
18 radiological qualities of water; or

19                   (5)   a hazardous substance, as defined by  
20 Section 101(14) of the federal Comprehensive Environmental  
21 Response, Compensation and Liability Act and 40 C. F. R. Part 302,  
22 Table 302. 4;

23           D.   "department" means the department of environment;

24           E.   "enforcement action" means:

25                   (1)   a written notice from the department or

1 other state agency that requires abatement of contamination under  
2 20 NMAC 6. 2;

3 (2) a written order from the department or other  
4 state agency that requires or involves the removal or remediation  
5 of contaminants;

6 (3) a judicial action by the department or other  
7 state agency seeking the abatement of contamination or the  
8 remediation of contaminants; or

9 (4) a notice, order or judicial action similar to  
10 those enumerated in Paragraphs (1) through (3) of this subsection,  
11 but initiated by the federal government;

12 F. "fraud" means the knowingly false representation,  
13 whether by words or conduct, and whether by inaccurate or  
14 misleading allegations or by concealment of that which should have  
15 been disclosed, that is intended to deceive or circumvent the  
16 intent of this statute;

17 G. "participant" means an applicant that has been  
18 approved by the department as eligible for and that signs and  
19 performs an agreement pursuant to the provisions of the Voluntary  
20 Remediation Act;

21 H. "person" means an individual or any other entity,  
22 including partnerships, corporations, associations, responsible  
23 business or association agents or officers, the state or a  
24 political subdivision of the state, or any agency, department or  
25 instrumentality of the United States and any of its officers,

1 agents or employees;

2 I. "release" means any spilling, leaking, pumping,  
3 pouring, emitting, emptying, discharging, injecting, escaping,  
4 leaching, dumping or disposing into the environment, including  
5 abandonment or discarding of any contaminant;

6 J. "remediation" means:

7 (1) actions necessary to investigate, prevent,  
8 minimize or mitigate damages to the public health or to the  
9 environment that may otherwise result from a release or threat of  
10 release; and

11 (2) the cleanup or removal of released  
12 contaminants to conform with applicable standards;

13 K. "site" means a parcel of real property for which an  
14 application has been submitted pursuant to the provisions of  
15 Section 5 of the Voluntary Remediation Act; and

16 L. "voluntary remediation" means remediation taken  
17 under and in compliance with the Voluntary Remediation Act.

18 Section 4. REGULATIONS. -- The department shall adopt and  
19 promulgate rules and regulations necessary to implement the  
20 provisions of the Voluntary Remediation Act. The rules and  
21 regulations shall provide for, among other things, the amount of  
22 the nonrefundable application fee and a schedule for the cost of  
23 the department's oversight of the voluntary remediation.

24 Section 5. APPLICATION AND FEE. --

25 A. To be eligible for a voluntary remediation agreement

1 an applicant must:

- 2 (1) own the site;
- 3 (2) operate a facility located on the site;
- 4 (3) be a prospective owner of the site; or
- 5 (4) be a prospective operator of a facility at
- 6 the site.

7 B. An applicant shall pay at the time of submitting the  
8 application a reasonable, nonrefundable application fee determined  
9 by the department in advance that will pay for the costs to the  
10 department of processing the application.

11 C. The participant shall pay all costs of the  
12 department's oversight of the voluntary remediation.

13 D. The department shall reject an application for a  
14 voluntary remediation agreement if the department determines:

15 (1) the contaminants at the site constitute, with  
16 reasonable evidence, an unreasonable threat to human health or the  
17 environment or Native American cultural or religious sites;

18 (2) an administrative state or federal or  
19 judicial state or federal enforcement action is pending that  
20 concerns remediation of contamination described in the application;

21 (3) a federal grant requires an enforcement  
22 action at the site;

23 (4) the application is incomplete or inaccurate  
24 and the alleged incompleteness or inaccuracy cannot be remedied by  
25 the applicant within thirty days;

1 (5) the site has a state or federal permit that  
2 addresses a contaminant described in the application, or a permit  
3 is pending;

4 (6) an agreement between the department and the  
5 environmental protection agency precludes the site from being  
6 addressed under this statute; or

7 (7) the applicant has, within ten years  
8 immediately preceding the date of submission of the application:

9 (a) knowingly misrepresented a material fact  
10 in an application for a permit or plan submitted pursuant to state  
11 environmental laws;

12 (b) refused or failed to disclose any  
13 material information required under this act;

14 (c) exhibited a history of willful disregard  
15 for environmental laws of any state or of the United States; or

16 (d) had an environmental permit revoked or  
17 permanently suspended for cause pursuant to provisions of any  
18 environmental laws of any state or of the United States.

19 E. The department shall determine, on a first-come,  
20 first-served basis and within a reasonable period defined by  
21 regulation, whether the applicant is eligible to participate in a  
22 voluntary remediation agreement pursuant to provisions of the  
23 Voluntary Remediation Act.

24 F. Before the department approves a proposed voluntary  
25 remediation agreement, the applicant must:

1           (1) make the proposed voluntary remediation  
2 agreement available for public inspection at a location in  
3 reasonable proximity to the site;

4           (2) notify the following and advise them of the  
5 proposed voluntary remediation agreement and the opportunity to  
6 submit comments to the department:

7                   (a) any local, state, federal, tribal or  
8 pueblo governmental agency potentially affected by the proposed  
9 voluntary remediation agreement;

10                   (b) those parties that have requested  
11 notification;

12                   (c) the general public by posting at the  
13 site on a form provided by the department; and

14                   (d) the general public by publishing in a  
15 newspaper of general circulation in the community potentially  
16 affected by the voluntary remediation agreement; and

17           (3) submit to the department a copy of the public  
18 notice as well as an affidavit affirming that the applicant has  
19 complied with the provisions of this subsection.

20           G. The department shall:

21                   (1) provide a comment period of at least thirty  
22 days following publication of the newspaper notice. During the  
23 comment period, interested persons may submit comments to the  
24 department concerning the proposed voluntary remediation agreement.  
25 The department shall consider public comments in deciding whether

1 to enter into a voluntary remediation agreement;

2 (2) during thirty day comment period, allow any  
3 interested person to request a public meeting. The request shall  
4 be in writing and shall set forth the reasons why the meeting  
5 should be held. A public meeting will be held if the secretary of  
6 environment determines that there is significant public interest;  
7 and

8 (3) provide for appropriate public participation  
9 in the voluntary remediation workplan, including a public meeting  
10 if the secretary of environment determines that there is  
11 significant public interest.

12 H. If an agreement is not reached between an applicant  
13 and the department on or before the thirtieth day after the  
14 department determines an applicant to be eligible pursuant to the  
15 provisions of this section, the applicant or the department may  
16 withdraw from the negotiations.

17 Section 6. AGREEMENT. --

18 A. After the department determines that an applicant is  
19 eligible, the secretary of environment may enter into a voluntary  
20 remediation agreement for remediation of the site that sets forth  
21 the terms and conditions of the department's evaluation and  
22 implementation of the oversight to be performed.

23 B. A voluntary remediation agreement shall include a  
24 provision for the department's oversight, including access to the  
25 site, on-site collection of samples and inspection and copying of

1 site records.

2 C. The department shall not initiate an enforcement  
3 action, including an administrative or judicial action, against a  
4 participant for the contamination or release thereof, or for the  
5 activity that resulted in the contamination or release thereof, if  
6 the contamination is the subject of an agreement pursuant to the  
7 provisions of the Voluntary Remediation Act; however, this section  
8 shall not be a bar to enforcement if the participant does not  
9 successfully initiate or implement the agreement within a  
10 reasonable time.

11 D. The participant may terminate a voluntary  
12 remediation agreement on sixty days' written notice. The  
13 department may terminate a voluntary remediation agreement on a  
14 finding that the participant is not in compliance with the  
15 voluntary remediation agreement. The department's costs incurred  
16 or obligated before the date the notice of termination is received  
17 are recoverable under the agreement if the agreement is terminated;

18 E. In the event that any participant is unable to  
19 resolve a dispute concerning the actions required under a voluntary  
20 remediation agreement, that participant may submit a written  
21 request for a final decision to the secretary of environment. The  
22 secretary of environment shall issue a binding final decision,  
23 including a written statement of the reason for the decision.

24 F. Unless the participant demonstrates that a cleanup  
25 is not required in order to comply with applicable standards, after

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1 a voluntary remediation agreement becomes effective, the  
2 participant shall submit a proposed voluntary remediation work plan  
3 for the site remediation.

4 Section 7. CERTIFICATE OF COMPLETION. --If the department  
5 determines that a participant has successfully complied with the  
6 voluntary remediation agreement and the site conditions meet  
7 applicable standards, the department shall issue the participant a  
8 certificate of completion.

9 Section 8. COVENANT NOT TO SUE. --

10 A. After the department issues a certificate of  
11 completion for a site, the secretary of environment shall provide a  
12 covenant not to sue to a purchaser of the site that did not  
13 contribute to the site contamination for any direct liability,  
14 including future liability for claims based upon the contamination  
15 covered by the agreement and over which the department has  
16 authority. Except as may be provided under federal law or as may  
17 be agreed to by a federal government entity, the covenant not to  
18 sue shall not release a participant from liability to the federal  
19 government for claims based on federal law. Except as may be  
20 agreed to by a third party, the covenant not to sue shall not  
21 release a person from liability to third parties.

22 B. The secretary of environment's covenant not to sue  
23 under this section shall be transferable with title to the site.

24 Section 9. RECISION. --Nothing in this chapter shall prohibit  
25 the secretary of environment from rescinding a certificate of

1 completion or a covenant not to sue if the department determines  
2 that:

3 A. contamination addressed in the agreement is, with  
4 reasonable evidence an unreasonable threat to human health or the  
5 environment;

6 B. the voluntary remediation agreement was performed in  
7 a manner that fails to comply substantially with the terms and  
8 conditions of the agreement or voluntary remediation work plan;

9 C. if the voluntary remediation agreement is a result  
10 of fraud; or

11 D. contamination was present at the site at the time  
12 the voluntary remediation agreement was signed, but the department  
13 did not know of the type, extent or magnitude of the contaminants.

14 Section 10. LENDER LIABILITY. -- An applicant who maintains  
15 indicia of ownership primarily to protect a security interest in a  
16 site that is the subject of a voluntary remediation agreement, who  
17 does not participate in the management of the site and who is not  
18 in control of or does not have responsibility for daily operation  
19 of the site shall not be considered an owner or operator of that  
20 site and shall not be liable under any contaminant control or other  
21 environmental protection law or regulation administered by the  
22 department or otherwise responsible to the department for any  
23 environmental contamination or response action costs associated  
24 with the site. This section shall apply to all indicia of  
25 ownership existing on and after the effective date of the Voluntary

1 Remediation Act.

2 Section 11. VOLUNTARY REMEDIATION FUND. --The "voluntary  
3 remediation fund" is created in the state treasury. The fund shall  
4 be administered by the department. All fees and oversight payments  
5 collected pursuant to the regulations adopted by the secretary of  
6 environment pursuant to the provisions of the Voluntary Remediation  
7 Act shall be deposited in the fund. Money in the fund is  
8 appropriated to the department for the purpose of administering the  
9 Voluntary Remediation Act. Disbursements from the fund shall be  
10 made upon warrants drawn by the secretary of finance and  
11 administration pursuant to vouchers signed by the secretary of  
12 environment.

13 Section 12. SEVERABILITY. --If any part or application of the  
14 Voluntary Remediation Act is held invalid, the remainder or its  
15 application to other situations or persons shall not be affected.

16 Section 13. EMERGENCY. --It is necessary for the public  
17 peace, health and safety that this act take effect immediately.

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SCONC/SB 446 & 362

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FORTY-THIRD LEGISLATURE  
FIRST SESSION, 1997

February 22, 1997

Mr. President:

Your FINANCE COMMITTEE, to whom has been referred

SENATE CONSERVATION COMMITTEE SUBSTITUTE FOR  
SENATE BILLS 446 & 362

has had it under consideration and reports same with recommendation  
that it DO NOT PASS, but that

SENATE FINANCE COMMITTEE SUBSTITUTE FOR  
SENATE CONSERVATION COMMITTEE SUBSTITUTE FOR  
SENATE BILLS 446 & 362

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DO PASS.

Respectfully submitted,

\_\_\_\_\_  
Ben D. Altamirano, Chairman

Adopted \_\_\_\_\_ Not Adopted \_\_\_\_\_  
(Chief Clerk) (Chief Clerk)

Date \_\_\_\_\_

The roll call vote was 6 For 0 Against

Yes: 6

No: None

Excused: Aragon, Carraro, Ingle, Lyons, McKibben

Absent: None

S0446FC1

Underscored material = new  
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SCONC/SB 446 & 362

SENATE FINANCE COMMITTEE SUBSTITUTE FOR  
SENATE CONSERVATION COMMITTEE SUBSTITUTE FOR  
SENATE BILLS 446 & 362

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

INTRODUCED BY

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR VOLUNTARY REMEDIATION  
OF CONTAMINATED REAL PROPERTY AND VOLUNTARY AGREEMENTS;  
AUTHORIZING COVENANTS NOT TO SUE; PROVIDING AUTHORIZATION FOR A  
FEE FOR ADMINISTRATION OF AGREEMENTS; APPROPRIATING FEES FOR  
OPERATION OF A VOLUNTARY REMEDIATION FUND; DECLARING AN  
EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the  
"Voluntary Remediation Act".

Section 2. PURPOSE. -- The purpose of the Voluntary  
Remediation Act is to provide incentives for the voluntary  
assessment and remediation of contaminated property, with state  
oversight, and to remove future liability of lenders and  
landowners.

.117457.2ms

Section 3. DEFINITIONS. --As used in the Voluntary

Remediation Act:

1 A. "applicable standards" means federal, state or  
2 local standards, requirements, criteria or limitations that are  
3 legally applicable to the facility;

4 B. "applicant" means a person that elects to submit an  
5 application to participate and enter into an agreement under the  
6 Voluntary Remediation Act;

7 C. "contaminant" means the following substances within  
8 the jurisdiction of the department:

9 (1) solid waste;

10 (2) hazardous waste as defined in 20 NMAC  
11 4.1.200;

12 (3) an RCRA hazardous waste constituent listed in  
13 Appendices VIII and IX in 20 NMAC 4.1.200;

14 (4) any substance that could alter, if discharged  
15 or spilled, the physical, chemical, biological or radiological  
16 qualities of water; or

17 (5) a hazardous substance, as defined by Section  
18 101(14) of the federal Comprehensive Environmental Response,  
19 Compensation and Liability Act and 40 C.F.R. Part 302, Table  
20 302.4;

21 D. "department" means the department of environment;

22 E. "enforcement action" means:

23 (1) a written notice from the department or other  
24 state agency that requires abatement of contamination under 20  
25 NMAC 6.2;

(2) a written order from the department or other

1 state agency that requires or involves the removal or remediation  
2 of contaminants;

3 (3) a judicial action by the department or other  
4 state agency seeking the abatement of contamination or the  
5 remediation of contaminants; or

6 (4) a notice, order or judicial action similar to  
7 those enumerated in Paragraphs (1) through (3) of this subsection,  
8 but initiated by the federal government;

9 F. "fraud" means the knowingly false representation,  
10 whether by words or conduct, and whether by inaccurate or  
11 misleading allegations or by concealment of that which should have  
12 been disclosed, that is intended to deceive or circumvent the  
13 intent of this statute;

14 G. "participant" means an applicant that has been  
15 approved by the department as eligible for and that signs and  
16 performs an agreement pursuant to the provisions of the Voluntary  
17 Remediation Act;

18 H. "person" means an individual or any other entity,  
19 including partnerships, corporations, associations, responsible  
20 business or association agents or officers, the state or a  
21 political subdivision of the state, or any agency, department or  
22 instrumentality of the United States and any of its officers,  
23 agents or employees;

24 I. "release" means any spilling, leaking, pumping,  
25 pouring, emitting, emptying, discharging, injecting, escaping,

1 leaching, dumping or disposing into the environment, including  
2 abandonment or discarding of any contaminant;

3 J. "remediation" means:

4 (1) actions necessary to investigate, prevent,  
5 minimize or mitigate damages to the public health or to the  
6 environment that may otherwise result from a release or threat of  
7 release; and

8 (2) the cleanup or removal of released contaminants  
9 to conform with applicable standards;

10 K. "site" means a parcel of real property for which an  
11 application has been submitted pursuant to the provisions of  
12 Section 5 of the Voluntary Remediation Act; and

13 L. "voluntary remediation" means remediation taken under  
14 and in compliance with the Voluntary Remediation Act.

15 Section 4. REGULATIONS. --The department shall adopt and  
16 promulgate rules and regulations necessary to implement the  
17 provisions of the Voluntary Remediation Act. The rules and  
18 regulations shall provide for, among other things, the amount of  
19 the nonrefundable application fee and a schedule for the cost of  
20 the department's oversight of the voluntary remediation.

21 Section 5. APPLICATION AND FEE. --

22 A. To be eligible for a voluntary remediation agreement  
23 an applicant must:

- 24 (1) own the site;
- 25 (2) operate a facility located on the site;

Underscored material = new  
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- 1                   (3) be a prospective owner of the site; or
- 2                   (4) be a prospective operator of a facility at the
- 3 site.

4                   B. An applicant shall pay at the time of submitting the  
5 application a reasonable, nonrefundable application fee determined  
6 by the department in advance that will pay for the costs to the  
7 department of processing the application.

8                   C. The participant shall pay all costs of the  
9 department's oversight of the voluntary remediation.

10                  D. The department shall reject an application for a  
11 voluntary remediation agreement if the department determines:

12                   (1) the contaminants at the site constitute, with  
13 reasonable evidence, an unreasonable threat to human health or the  
14 environment or Native American cultural or religious sites;

15                   (2) an administrative state or federal or judicial  
16 state or federal enforcement action is pending that concerns  
17 remediation of contamination described in the application;

18                   (3) a federal grant requires an enforcement action  
19 at the site;

20                   (4) the application is incomplete or inaccurate and  
21 the alleged incompleteness or inaccuracy cannot be remedied by the  
22 applicant within thirty days;

23                   (5) the site has a state or federal permit that  
24 addresses a contaminant described in the application, or a permit  
25 is pending;

1                   (6) an agreement between the department and the  
2 environmental protection agency precludes the site from being  
3 addressed under this statute; or

4                   (7) the applicant has, within ten years immediately  
5 preceding the date of submission of the application:

6                   (a) knowingly misrepresented a material fact in  
7 an application for a permit or plan submitted pursuant to state  
8 environmental laws;

9                   (b) refused or failed to disclose any material  
10 information required under this act;

11                   (c) exhibited a history of willful disregard  
12 for environmental laws of any state or of the United States; or

13                   (d) had an environmental permit revoked or  
14 permanently suspended for cause pursuant to provisions of any  
15 environmental laws of any state or of the United States.

16                   E. The department shall determine, on a first-come,  
17 first-served basis and within a reasonable period defined by  
18 regulation, whether the applicant is eligible to participate in a  
19 voluntary remediation agreement pursuant to provisions of the  
20 Voluntary Remediation Act.

21                   F. Before the department approves a proposed voluntary  
22 remediation agreement, the applicant must:

23                   (1) make the proposed voluntary remediation  
24 agreement available for public inspection at a location in  
25 reasonable proximity to the site;

1                   (2) notify the following and advise them of the  
2 proposed voluntary remediation agreement and the opportunity to  
3 submit comments to the department:

4                   (a) any local, state, federal, tribal or pueblo  
5 governmental agency potentially affected by the proposed voluntary  
6 remediation agreement;

7                   (b) those parties that have requested  
8 notification;

9                   (c) the general public by posting at the site  
10 on a form provided by the department; and

11                   (d) the general public by publishing in a  
12 newspaper of general circulation in the community potentially  
13 affected by the voluntary remediation agreement; and

14                   (3) submit to the department a copy of the public  
15 notice as well as an affidavit affirming that the applicant has  
16 complied with the provisions of this subsection.

17                   G. The department shall:

18                   (1) provide a comment period of at least thirty days  
19 following publication of the newspaper notice. During the comment  
20 period, interested persons may submit comments to the department  
21 concerning the proposed voluntary remediation agreement. The  
22 department shall consider public comments in deciding whether to  
23 enter into a voluntary remediation agreement;

24                   (2) during the thirty day comment period, allow any  
25 interested person to request a public meeting. The request shall

1 be in writing and shall set forth the reasons why the meeting  
2 should be held. A public meeting will be held if the secretary of  
3 environment determines that there is significant public interest;  
4 and

5 (3) provide for appropriate public participation in  
6 the voluntary remediation work plan, including a public meeting if  
7 the secretary of environment determines that there is significant  
8 public interest.

9 H. If an agreement is not reached between an applicant  
10 and the department on or before the thirtieth day after the  
11 department determines an applicant to be eligible pursuant to the  
12 provisions of this section, the applicant or the department may  
13 withdraw from the negotiations.

14 Section 6. AGREEMENT. --

15 A. After the department determines that an applicant is  
16 eligible, the secretary of environment may enter into a voluntary  
17 remediation agreement for remediation of the site that sets forth  
18 the terms and conditions of the department's evaluation and  
19 implementation of the oversight to be performed.

20 B. A voluntary remediation agreement shall include a  
21 provision for the department's oversight, including access to the  
22 site, on-site collection of samples and inspection and copying of  
23 site records.

24 C. The department shall not initiate an enforcement  
25 action, including an administrative or judicial action, against a

1 participant for the contamination or release thereof, or for the  
2 activity that resulted in the contamination or release thereof, if  
3 the contamination is the subject of an agreement pursuant to the  
4 provisions of the Voluntary Remediation Act; however, this section  
5 shall not be a bar to enforcement if the participant does not  
6 successfully initiate or implement the agreement within a  
7 reasonable time.

8 D. The participant may terminate a voluntary remediation  
9 agreement on sixty days' written notice. The department may  
10 terminate a voluntary remediation agreement on a finding that the  
11 participant is not in compliance with the voluntary remediation  
12 agreement. The department's costs incurred or obligated before the  
13 date the notice of termination is received are recoverable under  
14 the agreement if the agreement is terminated.

15 E. In the event that any participant is unable to resolve  
16 a dispute concerning the actions required under a voluntary  
17 remediation agreement, that participant may submit a written  
18 request for a final decision to the secretary of environment. The  
19 secretary of environment shall issue a binding final decision,  
20 including a written statement of the reason for the decision.

21 F. Unless the participant demonstrates that a cleanup is  
22 not required in order to comply with applicable standards, after a  
23 voluntary remediation agreement becomes effective, the participant  
24 shall submit a proposed voluntary remediation work plan for the  
25 site remediation.

1           Section 7.   CERTIFICATE OF COMPLETION. --If the department  
2 determines that a participant has successfully complied with the  
3 voluntary remediation agreement and the site conditions meet  
4 applicable standards, the department shall issue the participant a  
5 certificate of completion.

6           Section 8.   COVENANT NOT TO SUE. --

7           A.   After the department issues a certificate of  
8 completion for a site, the secretary of environment shall provide a  
9 covenant not to sue to a purchaser of the site that did not  
10 contribute to the site contamination for any direct liability,  
11 including future liability for claims based upon the contamination  
12 covered by the agreement and over which the department has  
13 authority.   Except as may be provided under federal law or as may  
14 be agreed to by a federal government entity, the covenant not to  
15 sue shall not release a participant from liability to the federal  
16 government for claims based on federal law.   Except as may be  
17 agreed to by a third party, the covenant not to sue shall not  
18 release a person from liability to third parties.

19           B.   The secretary of environment's covenant not to sue  
20 under this section shall be transferable with title to the site.

21           Section 9.   RECISION. --Nothing in this chapter shall prohibit  
22 the secretary of environment from rescinding a certificate of  
23 completion or a covenant not to sue if the department determines  
24 that:

25           A.   contamination addressed in the agreement is, with

1 reasonable evidence, an unreasonable threat to human health or the  
2 environment;

3 B. the voluntary remediation agreement was performed in a  
4 manner that fails to comply substantially with the terms and  
5 conditions of the agreement or voluntary remediation work plan;

6 C. the voluntary remediation agreement is a result of  
7 fraud; or

8 D. contamination was present at the site at the time the  
9 voluntary remediation agreement was signed but the department did  
10 not know of the type, extent or magnitude of the contaminants.

11 Section 10. LENDER LIABILITY. -- An applicant who maintains  
12 indicia of ownership primarily to protect a security interest in a  
13 site that is the subject of a voluntary remediation agreement, who  
14 does not participate in the management of the site, and is not in  
15 control of or does not have responsibility for daily operation of  
16 the site shall not be considered an owner or operator of that site  
17 and shall not be liable under any contaminant control or other  
18 environmental protection law or regulation administered by the  
19 department or otherwise responsible to the department for any  
20 environmental contamination or response action costs associated  
21 with the site. This section shall apply to all indicia of  
22 ownership existing on and after the effective date of the Voluntary  
23 Remediation Act.

24 Section 11. VOLUNTARY REMEDIATION FUND. -- The "voluntary  
25 remediation fund" is created in the state treasury. The fund shall

1 be administered by the department. All fees and oversight payments  
2 collected pursuant to the regulations adopted by the secretary of  
3 environment pursuant to the provisions of the Voluntary Remediation  
4 Act shall be deposited in the fund. Money in the fund is  
5 appropriated to the department for the purpose of administering the  
6 Voluntary Remediation Act. Disbursements from the fund shall be  
7 made upon warrants drawn by the secretary of finance and  
8 administration pursuant to vouchers signed by the secretary of  
9 environment.

10 Section 12. SEVERABILITY.--If any part or application of the  
11 Voluntary Remediation Act is held invalid, the remainder or its  
12 application to other situations or persons shall not be affected.

13 Section 13. EMERGENCY.--It is necessary for the public peace,  
14 health and safety that this act take effect immediately.

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# **State of New Mexico House of Representatives**

**FORTY-THIRD LEGISLATURE  
FIRST SESSION, 1997**

**March 10, 1997**

Mr. Speaker:

Your ENERGY AND NATURAL RESOURCES COMMITTEE, to  
whom has been referred

SENATE FINANCE COMMITTEE SUBSTITUTE FOR SENATE  
CONSERVATION COMMITTEE SUBSTITUTE FOR SENATE BILLS  
446 AND 362

has had it under consideration and reports same with  
recommendation that it DO PASS, and thence referred to the  
APPROPRIATIONS AND FINANCE COMMITTEE.

FORTY-THIRD LEGISLATURE  
FIRST SESSION, 1997

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Respectfully submitted,

\_\_\_\_\_  
James Roger Madalena, Chairman

Adopted \_\_\_\_\_ Not Adopted \_\_\_\_\_  
(Chief Clerk) (Chief Clerk)

Date \_\_\_\_\_

The roll call vote was 11 For 0 Against

Yes: 11

Excused: Knowles

Absent: None

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# **State of New Mexico House of Representatives**

FORTY-THIRD LEGISLATURE  
FIRST SESSION, 1997

March 11, 1997

Mr. Speaker:

Your APPROPRIATIONS AND FINANCE COMMITTEE, to whom  
has been referred

SENATE FINANCE COMMITTEE SUBSTITUTE FOR SENATE  
CONSERVATION COMMITTEE SUBSTITUTE FOR  
SENATE BILLS 446 & 362

has had it under consideration and reports same with  
recommendation that it DO PASS, amended as follows:

1. On page 12, line 7, after the period, strike the remainder  
of the line and insert in lieu thereof "The money in the fund shall  
be".

2. On page 12, line 8, after "appropriated" insert "by law".

FORTY-THIRD LEGISLATURE  
FIRST SESSION, 1997

HAF C/SFC/SCONC/SB 446 & 362

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Respectfully submitted,

\_\_\_\_\_  
Max Coll, Chairman

Adopted \_\_\_\_\_ Not Adopted \_\_\_\_\_  
(Chief Clerk) (Chief Clerk)

Date \_\_\_\_\_

The roll call vote was 11 For 0 Against

Yes: 11

Excused: Bird, Buffett, Marquardt, Pearce, Salazar, Varela

Absent: None

M \S0446